SUPREME COURT OF THE UNITED STATES.

No. 350.

THE UNITED STATES, APPELLANT,

vs.

BENJAMIN HIGDON.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the U. S. Court of Claims.

BENJAMIN HIGDON
vs.
THE UNITED STATES. } No. 1,874.

Petition.

To the Judges of the United States Court of Claims:

The petition of Benjamin Higdon, of Cincinnati, State of Ohio, respectfully showeth:

That heretofore, to wit, on or about the eleventh day of September, one thousand eight hundred and sixty-one, your petitioner, at Cincinnati aforesaid, contracted with the United States for the delivery to them of sixteen hundred horses; six hundred to be dark colored number one artillery horses, and the remainder to be mixed, artillery, cavalry, and wagon horses, to be delivered on the cars at Cincinnati aforesaid, for which the United States agreed to pay one hundred and thirty dollars per head.

And your petitioner avers, that he proceeded to fulfill the contract on his part, by the delivery of horses, which the United States inspected, accepted, and received under said contract, and that he continued so to deliver and they to inspect and receive until they refused further to receive horses under it, or further to fulfill the same on their part.

And he further avers, that he delivered, and the United States inspected and received under said contract, and gave vouchers therefor in due form, to the number of one thousand four hundred and twenty-three, to wit, prior to the fifth day of October, one thousand eight hundred and sixty-one, which said horses they appropriated and applied to their own use.

And your petitioner further avers, that there remains due and unpaid to him from the United States, on account of the said horses so sold and delivered to them, over and above all payments made to him, and over and above all just set-off, the sum of twenty-one thousand three hundred and forty-five dollars, with interest from the dates of the delivery of the said horses; and he prays this court to adjudge that the United States pay him that sum, with interest from the terms of such delivery until paid.

Your petitioner further avers, that he has caused due demand to be made of the War Department, of payment of the money above claimed, but that such payment was refused.

And he further avers, that he is the sole owner of this claim, and prosecutes the same for his own benefit.

B. HIGDON, *Petitioner.*

R. H. GILLET,
Solicitor for Petitioner.

STATE OF OHIO, *City of Cincinnati, ss:*

Benjamin Higdon, the above-named petitioner, being duly sworn, doth depose and say, that he has read the foregoing petition, and understood the matters therein stated, and that they are true as he verily believes.

B. HIGDON.

Subscribed and sworn before me, this 22d day of September, 1862.

ALEX. PADDOCK,
Judge of Probate Court, in and for said County of Hamilton, State of Ohio.

2 BENJAMIN HIGDON *vs.* THE UNITED STATES. } No. 1,874.

And now comes the said claimant, and by leave of the court amends his petition, and says:

That the said claimant is a citizen of the United States; that he has at all times borne true allegiance to the government of the United States; and that he has not in any way aided, abetted, or given encouragement to any rebellion against the said government.

B. HIGDON.

STATE OF OHIO, *County of Hamilton, ss:*

Benjamin Higdon, the above-named claimant, being duly sworn, says, that his petition in the above-entitled cause, as proposed to be amended as above, is true, and the above amendment states the truth.

B. HIGDON.

Subscribed and sworn to before me, this 21st day of March, 1867.

QUINTON CORWINE,
Commissioner of U. S. Court of Claims.

3 In the Court of Claims.

BENJAMIN HIGDON *vs.* THE UNITED STATES. } No. 1,874.

And now, to wit, 25th of March 1867, the court upon due consideration of the premises, do find in favor of the claimant, and so order, adjudge and decree that the said Benjamin Higdon have and recover from the United States the sum of twenty-one thousand three hundred and forty-five dollars, ($21,345 00.)

BY THE COURT.

4 Court of Claims.

BENJAMIN HIGDON
vs.
THE UNITED STATES. } No. 1,874.

The United States, by E. P. Norton, its solicitor hereby makes application to the honorable Court of Claims for an appeal, of the case of Benjamin Higdon *vs.* The United States (No. 1,874) to the Supreme Court of the United States.

E. P. NORTON,
Solicitor for the United States.

Filed in the clerk's office, June 10th, 1867.

5 At a Court of Claims, held at the Capitol, in the City of Washington, on Tuesday, the 25th day of June, A. D. 1867.

ALBERT L. MOWRY
vs.
THE UNITED STATES. } No. 1,871.

SAMUEL J. MORGAN
vs.
THE UNITED STATES. } No. 1,872.

OLIVER H. GEFFROY
vs.
THE UNITED STATES. } No. 1,873.

BENJAMIN HIGDON
vs.
THE UNITED STATES. } No. 1,874.

Mr. Norton presented to the court in the above-entitled cases, his application for an appeal, respectively filed therein in the clerk's office on the 10th of instant, June, from the judgement respectively entered therein on the 25th of March last, to the Supreme Court of the United States, whereupon, the claimants, by their counsel, Messrs. Carlisle and McPherson, filed objections to the allowance of the same, and the several cases were submitted.

6 At a Court of Claims, held at the Capitol, in the city of Washington, on Wednesday, the 26th day of June, 1867:

BENJAMIN HIGDON
vs.
THE UNITED STATES. } No. 1,847.

Ordered, that the petition for an appeal filed in this case by the Solicitor of the United States, be allowed.

7 Court of Claims.

BENJAMIN HIGDON
vs.
THE UNITED STATES. } No. 1,874.

The court find the following facts to be proved and established:

1. On the 10th day of August, 1861, Major General John C. Fremont, commanding the military department known as the "Department of the West," and acting on behalf of the defendants, appointed one John E. Reeside inspector of horses for the said department, and at the same time appointed him also a purchasing agent of the defendants, it being also understood and agreed that the said Reeside should be responsible that every animal passed by him should
8 be equal in value to the price paid, and that the defendants should to him for his said services and responsibility a commission of two and one-half per cent. upon the price paid for the horses so purchased, which agreement was set forth in the words following:

"HEADQUARTERS WESTERN DEPARTMENT,
"ST. LOUIS, *August* 10, 1861.

"SIR: Having confidence in your knowledge and experience, I hereby authorize and commend you as inspector of horses for this department, holding you responsible that every animal passed by you shall be equal in value to the price paid.

"You will be allowed two and a half per cent. commisson.

"J. C. FREMONT,
"*Major General Commanding.*

"JOHN E. REESIDE, Esq., *Inspector of horses.*"

"HEADQUARTERS WESTERN DEPARTMENT,
"ST. LOUIS, *August* 10, 1861.

"SIR: You will proceed, without delay, to Cincinnati, and purchase, cause to be purchased, or inspect when purchased by other contractors, two thousand horses for the service of the army in this department.

"You will not pay, on an average, over one hundred and thirty dollars each, at such places as you may name as places of inspection. The horses are required to be suited to the most active field service, not too heavy for artillery nor too light for cavalry; of approved blood, so far as the prices will obtain such.

"J. C. FREMONT,
"*Major General Commanding.*

"JOHN E. REESIDE, Esq., *Inspector of horses.*"

9 2. Under the said appointment of Maj. Gen. Fremont, the said Reeside, acting for and on behalf of the defendants,

entered into an agreement to purchase from the claimant sixteen hundred horses at the agreed price of $130 each, which agreement was in the words following:

"CINCINNATI, *Sept.* 11, 1861.

"Messrs. R. M. CORWINE and J. E. REESIDE:

"I hereby propose to furnish and deliver on the cars at Cincinnati sixteen hundred horses—six hundred of which shall be No. 1 artillery horses, all dark colors; the balance, one thousand, mixed artillery, cavalry, and wagon horses—at one hundred and thirty dollars per head.

"Respectfully, "B. HIGDON."

"Accepted. Cincinnati, Sept. 11, 1861.

"J. E. REESIDE."

3. Under and in pursuance of the said agreement the claimant delivered to the said Reeside, acting on behalf of the defendants, fourteen hundred and twenty-three horses, which were duly inspected and branded by the said Reeside, and by him were turned over and delivered to various quartermasters of the defendants, who received and accounted for the same as for other property of the United States purchased by or turned over to them; and that the said Reeside and the said quartermasters gave to the claimant the usual certificates and vouchers which were in the form following:

The United States to Crain & Higdon. Dr.

1861.

Oct. 5. To 107 horses, at $130 each $13,910 00

I hereby certify that I have inspected and approved the above number of horses for Crain & Higdon, contractors for purchasing horses for the army of the United States in the Western Department, and that the above account is correct and just.

J. E. REESIDE,

Inspector of horses for Western Department, U. S. A.

Cincinnati, October 5, 1869.

The horses specified in this account were shipped to St. Louis for Colonel F. P. Blair, artillery regiment.

J. E. REESIDE.

I certify that the above account is correct and just, and that the articles will be accounted for on my property return for the quarter ending on the 31st day of December, 1861.

JAMES M. BRADSHAW,

Captain, Assistant Quartermaster.

And the said horses thereupon entered into the use and service of the defendants, by being used in their military service.

11 4. The value of the said fourteen hundred and twenty-three horses, so sold and delivered as aforesaid, was one hundred and thirty dollars per head, amounting in the whole to the sum of $184,990.

5. In October, 1861, and after the said horses had been delivered as described in the third finding aforesaid, the defendants refused to pay the price thereof to the claimant, and referred the certificates and vouchers described in the said third finding, to a military commission appointed by the Secretary of War, known as the "Davis, Holt, and Campbell Commission;" and the said commission thereupon deducted the sum of $15 per horse from the agreed or contract price of the said horses, and before delivering to the claimant his said vouchers, required him to sign and execute a
12 certain instrument or agreement purporting to release to the defendants the said amount so deducted, to wit, the sum of $15 on every horse sold, which release was attached to a schedule of claims of various persons, and was in the words following:

"The undersigned acknowledge to have received the vouchers referred to and described below, which, when paid, will be in full of all demands against the United States on account of their respective claims set opposite their respective names."

At the time of signing this agreement the claimant objected to so doing, and protested against being required so to do by the said commission.

The claimant subsequently received the amount allowed upon his claim by the said commission, to wit, the sum of $115 per horse, for the said fourteen hundred and twenty-three horses, and at the same time gave to the defendants the voucher or receipt in the form following:

Received at Washington, District of Columbia, the 1st day of April, 1862, of Major Morris S. Miller, Quartermaster United States Army, twelve thousand three hundred and five dollars, in full of the above account.

CRAIN & HIGDON.

13 6. The balance of $15 per horse on each of the said fourteen hundred and twenty-three horses, amounting to the sum of $21,345, has never been paid by the defendants to the said claimant.

7. At the time of the appointment of the said John E. Reeside, set forth and described in the first finding of facts, and at the time of the sale and delivery of the horses mentioned and described in the second finding of facts, the public exigencies arising out of the war of the rebellion required the immediate performance of the services of the said Reeside, and the immediate delivery of the said horses by the claimant, and that the said services and the said arti-
14 cles were procured by contract at the places and in the manner in which such services were usually engaged, and such articles were usually bought and sold between individuals.

15 And upon the facts aforesaid, the court find and determine the following conclusions of law:

1. The agreement made by Maj. Gen. Fremont, with John E. Reeside, mentioned and described in the first finding of fact, was illegal and void, and did not bind the defendants, nor constitute the said John E. Reeside the purchasing agent of the United States.

2. The express contract entered into by Reeside, on behalf of the defendants, with the claimant, mentioned and described in the second finding of facts, was illegal and void, and was not the contract of and did not bind the defendants.

3. The delivery to, and acceptance of the horses, mentioned and described in the third finding of fact, by the defendants as set
16 forth in the said finding, constituted an implied contract or agreement upon which the claimant is entitled to recover the just and reasonable value of the property so sold and delivered, after deducting therefrom all payments made on account thereof by the defendants.

4. The agreement or release mentioned and described in the fifth finding of fact was illegal and void, and does not bar the claimant from recovering the amount or balance due from the defendants.

5. The claimant is entitled to recover the balance of $15 per horse, on each horse sold and delivered as aforesaid, amounting to the sum of $21,345, as set forth in the sixth finding of fact.

17 In the Court of Claims.

BENJAMIN HIGDON, *vs.* THE UNITED STATES. } No. 1,874.

I, Samuel H. Huntington, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and of the final judgment of the court thereon; of the application of the solicitor of the United States for the allowance of an appeal, as filed in the clerk's office on the 10th of June, 1867, and presented to the court on the 26th of June, 1867, and of the order of the court allowing the same, and of the finding of the facts in the case by the court, and the conclusions of law on said facts on which the court founds its judgments.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this 6th day of December, A. D. 1867.

[SEAL.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

In the Supreme Court of the United States.

THE UNITED STATES, *Appellant.*
vs
SAM'L J. MORGAN. } *No.* 191.

SAME
vs.
JONATHAN P. BURTON. } *No.* 192.

SAME
vs.
OLIVER H. GEFFROY. } *No.* 193.

SAME
vs.
BENJAMIN HIGDON. } *No.* 197.

BRIEF OF CARLISLE & MCPHERSON, FOR APPELLEES.

These are appeals from judgments of the Court of Claims.

THE CASES,

which are, *mutatis mutandis* identical, are presented by the finding of the Court as follows:

1. John E. Reeside a civilian was in August, 1861, directed by General Fremont to purchase, caused to be purchased, and inspect when purchased, large number of horses required for his command in Mississippi, and to fix the prices for the same not exceeding an average of $130, the order at the same time holding him responsible that the horses purchased should equal in value to the price paid.

2. Reeside purchased and inspected horses offered by the claimants, and fixed the price.

3. The horses so purchased entered into the use and service of the United States, and were used in the military service.

4. The exigencies of the military service arising out of the rebellion required the immediate performance of the service of Reeside, and the immediate delivery of the horses, and they were procured by contract at the place, and in the manner in which such services were usually engaged, and such articles bought and sold between individuals.

5. The said horses were worth the price so fixed by Reeside.

6. The claimants having received certified Quartermasters vouchers for the animals furnished, presented the same to the Holt-Davis-Campbell commission, who allowed a less price than that agreed on, and required the claimants on receiving back these vouchers to execute a receipt in the form set forth in the record expressed to be in full of all demands.

7. The express contract made by Reeside—a private person and not a Quartermaster—was by the Court held to be unauthorized and void, but being satisfied upon the proofs of the facts above stated, and that the horses were worth the price agreed to be paid and that they had been duly received into the use and service of the United States by the authorized officer thereof, the Court held that there was an implied contract by the United States to pay such value. and the claimant having received a less sum by direction of the Holt, Davis, Campbell commission, judgments were rerendered in favor of the claimants for the respective balance.

But two questions of law arise upon these records.

I. Whether an implied contract exists by reason of the facts so found by the Court, to pay the fair value of the horses sold and delivered to and actually used by the United States in the military service.

II. Whether receipts signed by the respective claimants shown by record and found by the Court, bar any further recovery by them respectively.

I.

Upon the first point we deem it unnecessary to cite any authority.

II.

Upon the second point we refer, and ask the attention of the Court to the concurring opinion of Chief Justice Casey, of the Court of Claims upon this question, and to the authorities cited by him, what we extract from the reports of the Court of Claims, in 2 N. & W., p. 54 :

"It is finally urged upon us that though these contracts may have been originally valid and binding, the claims made upon them are barred by the proceedings under the Holt-Davis commission, and the acceptance by several of these claimants of the amounts awarded them by that board, and giving receipts in full for their entire claims. These facts have been pressed upon us earnestly in various aspects, 1st. As an arbitrament and award ; 2d, as accord and satisfaction ; 3d, as a compromise of doubtful and disputed rights.

1. "It has no feature whatever of a submission or arbitration. The commission was an *ex parte* one ; constituted not to decide upon the validity and amount of the claims, but as to the facts and circumstances surrounding the transactions out of which they arose. It was intended to elicit facts instead of reaching conclusions or producing final results. Arbitrament always implies mutual submission of the dispute. In our case it is totally wanting. But if there had been even a concurrence in the submission by the claimants it would still be unavailing; for, to render an award binding on either party, it must be equally obligatory on both. The Secretary of War had no power to submit the rights of the United States to the arbitrament of private

and unofficial persons. He could only adjust the claims against his department through the agencies constituted by the law, or through the judicial courts of the nation. There was no law authorizing him to make and constitute such a tribunal. Hence their decisions and reports, whatever light they may have cast upon the transactton or information imparted to the department and the Secretary, had no binding force and efficacy. None upon the United States, because no law of Congress had authorized their acts; none upon the claimant as an award, because of the absence of all reciprocal obligation or mutuality. Congress alone has the power to submit the rights of the Government to arbitration, or, at least, to prescribe the mode and manner in which it shall be done. (See *Kendall* v. *The United States*, 12 Peters, 611; also, *DeGroot* v. *United States*, decided in this Court at this term.) As an award, if otherwise good, it was not binding on the United States when made, and of course not on the claimants. That Congress impliedly ratified the finding, by directing the amounts found due by the commission to be paid, could not alter the case, as it could not relate back and make that binding on the claimants which before was simply void as to both. But it never was regarded by the Secretary of War, Congress, or the claimants, in any other light than as an *ex parte* affair, adopted as the best means that suggested itself of getting full and accurate information to guide the future action of the department in adjusting or contesting the claims.

"But let us test this question a little closer, Suppose this commission, instead of deducting a large sum from the contract prices had added the same amount to them, and these suits instead of being brought upon the contracts were upon such awards, and the position of the parties be thereby reversed, the United States defending under the contracts instead of now under the award, how would the matter stand? Could the award in such case be sustained? Clearly not. And this answers the whole argument; because, if

available as a defence now, it would in the other case be equally so as a ground of suit.

2. "To support an allegation or plea of accord and satisfaction there must be some new consideration moving from the party who sets it up. The payment of part of a debt, in consideration of the creditor relinquishing the residue, where the debt is due at the time, will not support the plea or averment. (*Warren* v. *Skinner*, 20 Conn. Rep., 559, 1 Bac. Ab., 43.) To sustain a release not under the seal a consideration of some kind, apart from the original indebtedness, is necessary; and without such consideration it is *numdum pactum* and void. In support of this principle there is no overflowing flood of authorities, without sufficient counter-current to make an eddy in the stream, or a ripple on its surface. The case of *Wentz* v. *De Haven*, (1 Sergt. and K., 312,) cited by the solicitor, which intimated a contrary doctrine, has been repeatedly overuled by the same court which inadvertently made it. (*Whitechill* v. (*Wilson*, 3 Penn. Rep., 405; *Campbell's estate*, 7 Barr, 101; *Kennedy* v. *Barr*, 445; *Kidder* v. *Kidder*, 9 Casey, 268.) There is scarcely a State in the Union where it has not been repeatedly decided that a receipt in full is but *prima facie* evidence of payment; and that, as between the parties to it such receipt may be explained, varied, or contradicted by parol. It is equally well settled that part payment of a debt is not sufficient consideration to support a release of the residue, or an agreement not to sue for it. To cite even a tithe of the cases in which this doctrine is maintained and, enforced would swell this opinion beyond due bonds. A few will suffice. The leading case, upon which the others are all grounded, is Pinnel's case. (5 Rep., 110.) In that case "it was resolved by the whole court that payment of a lesser sum on the day, in satisfaction of a greater, cannot be any satiafaction for the whole, because it appears to the judges that, by no possibility, a lesser sum can be satisfac-

tion to the plaintiff for a greater sum." "When the whole sum is due, by no intentment the acceptance of a parcel can be satisfaction to the plaintiff."

"The case will be followed and the principle sustained by Pratt, C. J., in *Cumber* v. *Wane*. (1 Strange, 426.) And again, more explicitly, by Lord Ellenborough, in *Fitch* v. *Sutton*. (5 East., 232.) "But it cannot be pretended that a receipt of part only, though expressed to be in full of all demands, must have the same operation as a release. It is impossible to contend that acceptance of £17 10*s*. is an extinguishment of a debt of £50. There must be some consideration for the relinquishment of the residue; something collateral to show a possibility of benefit to the party relinquishing his further claim; otherwise the agreement in *nudum pactum*. But the mere promise to pay the rest when of ability put the plaintiff in no better condition than he was before. It was expressly determined in *Cumber* v. *Wane* that exceptance of a security for a lesser sum cannot be pleaded in satisfaction of a greater. That decision is directly supported by the authority of Pinnel's case, which never appears to have been questioned."

"For this ruling there has scarcely been a departue up to the present day in England, where it is firmly established. And this same principle has been followed, as already stated, in nearly every State in the Union, its sound sense and justice commending it to the judgment and conscience of courts everywhere and at all times. A few of the American cases are here referred to, which will be found to sustain the doctrine to the full extent to which I apply it in this case: *Sigourney* v. *Sibles*, 21 Pick., 102; *Miller* v. *Hemgler*, 5 W. and S., 486; *Lawrence* v. *The Schuylkill Navigation Company*, 4 W. C. C.,, 526; *Moize* v. *Miller*, 1 *ibid.*, 328; *Hope* v. *Johnson*, 11 Rich. L., 199; *Kidder* v. *Kidder*, 9 Casey, 268; *Pabodie* v. *King*, 12 John., 426; *Cushing* v. *Wyman*, 44 Maine. 121; *Ryan* v. *Rand*, 6 Fost., (N. H.,) 12; *Frink* v. *Balton*, 15 Il. Rep., 343; *Jones* v.

Rickets, 7 Md. Rep-, 109; *Hardy* v. *Coe*, 5 Gill., 189; *Bailey* v. *Day*, 26 Me., 88; *Miller* v. *Holden*, 18 Vermont. 337; *Mason* v. *Peters*, 4 *id.*, 101; and *Wheeler* v. *Wheeler*, 11 Vt., 60.

'A careful view of the English and American authorities will demonstrate, beyond a controversy, that there is no case of recognized and established authority that contravenes the principle we apply in this case. Whenever the rule and the principle have appearently been departed from, it will be found that the debt of demand was uncertain and unliquidated. Whenever, as in our cases, the amount of the claim or debt is definate and certain, the principle is invariably applied. In such cases as are unsettled, where the parties come together and agree to settle and liquidate the demand at a certain amount, and it is paid and received in full satisfaction, in good faith, it will be sustained as accord and satisfaction, or a compromise. In the case we are considered there is nothing for such a doctrine to operate upon. They are not open, unadjusted, unsettled claims that the claimants held. They were regular official vouchers, given by tne quartermasters, stating in words and figures the amount due the parties, or were distinct written contracts specifying precisely the amount to be paid for materialy furnished or services performed. So these claims are treated by this commission. The amount of vouchers of the claimants. or of their contracts, is plainly set down. From that amount a certain sum is arbitrarily deducted, and the proposition made, "Take this less sum in satisfaction for the whole, or get nothing."' It is taken and a receipt in full given, or an agreement signed not to sue for residue. Now where is the consideration for this promise? The demand was specific. The United States has so treated it in every instance. What the claimants received was admitted to be due to them, inrespective of this arrangement. Where, then, is the lates spark or title of consideration to support and sustain these pretended releases, or accords and satisfaction?

Without regard to the manner in which they were wrung from the fears or necessities of the claimants, they are as bald and naked promises as could be presented to the consideration of a court. It is not pretended there was any new consideration. There was no change of time, place, or mode of payment. It was simply an agreement to receive a part in place of the whole of a specific liquidated claim, As such it is entirely without any binding force.

3. "The facts set up, it is alleged, if they do not constitute an award, a release, or accord, they amount to a compromise of a doubtful and disputed right. Where a party voluntarily and without any oppression or undue influence being exercised upon him by the other, relinquishes a part of a disputed claim and accepts the less sum in discharge of the whole, it is binding on him as a compromise. It is puite clear that where a dispute arises between two parties as to the validity or amount of a claim, and they in good faith mutually agree to pay and receive a certain sum, or such sum as a third party shall award, and it is voluntarily paid and accepted in discharge of the whole claim, that it is a final and binding compromise which neither will be permitted to gainsay or reopen. But such are not the facts of the cases we are considering. To make an agreement of compromise effectnal it must be fair, open, and free from undue influence, oppression, and extortion. The parties must stand upon equal grounds. Not so in our cases. This alleged compromise commences and has its inception in the appointment by the War Department, without the knowledge and consent of the claimants, of this one-sided commission. Their cases are taken up either voluntarily or by compulsion. Where the party does not submit his vouchers, his claim is seized upon by the records of the quartermaster's department. The amounts are arbitrarily fixed, their papers are withheld, and they are reminded that unless they take what is offered they can neither have their papers nor the money that is admitted to be due to them. This is the com-

promise. They agreed to it because they were compelled to do so.

"It is admitted that the claimants had no voice in the selection of these commissioners, who are now called arbitrators. They did not, either before or after the report was made, agree that they should act as referees or arbitrators on their rights. They entered into no stipulation to abide by the report or award. They did more—they protested agains the injustice of the decisions, and the sequestration of their vouchers and papers. It is admitted the commissioners had no right, in any view, to withhold the papers, least of all for the purpose of compelling an unwilling submission to their finding. Yet they did withhold them, and for the very purpose avowed, and apparent of forcing an acquiescence in their decision. They succeeded in obtaining that submission and acquiescence. Is this arbitrament and award? Is this accord and satisfaction? Is it compromise? The rack and torture often produced similar submissions—the like compromises—but little less odious, and not a whit more unlawful.

"It was at one time maintained that duress of the person was necessary to avoid an agreement, and that duress or detention of goods would not have that effect. That doctrine is now exploded. The case of *White* v. *Heylman* (10 Casey, 142) closely resembles the one in hand. There Heylman refused to deliver to White certain deeds and paders belonging to the latter, until he would pay him $300 in money, and give his note for two hundred more. The action was on that note. Mr. Justice Read says: "Neither the payment of the cash nor the giving of the note was voluntary, but both were extorted from the defendant, and came within that class of cases in which money illegally claimed and paid has been recovered back, where goods, deeds, or papers have been wrongfully withheld until the money has been paid."

"In *Ripley* v. *Gelston* (9 John's Rep.,201) it was held that duties illegally exacted by a collector of customs before he

would deliver the goods could be recovered back from him, although he had paid the money over into the public treasury. So in *Clinton* v. *Strong*, (19 John, 370,) of costs illegally exacted by an officer.

"In *Whetler* v. *Smith* (9 How., 55) the Supreme Coutt of United States set aside an alleged compromise, on the ground that the party setting it up had taken an unfair advantage of the other's necessities. Mr. Justice McLean says, on pages 82, 83: "But in making the compromise the parties did not stand on equal ground. The necessities and character of the complainant were well known to the executors."

"In *Elliott* v. *Swartwout*, (10 Peters, 137) the same court holds that duties or taxes illegally exacted by an officer, before he would deliver the parties' goods, were not voluntary payments, and could be recovered back. (*Hearsey* v. *Pruyn*, 7 John, 179.)

"In *Ashmole* v. *Wainwright* (2 Queen's Bench Rep., 837) a common carrier refused to deliver the plaintiff his goods until he paid a sum in excess of the legal freight. He paid the sum demanded, protesting against it as exhorbitant. The court held he could recover it back in assumpsit.

"So in *Wakefield* v. *Newborn*, (6 Queen's Bench, 281,) an attorney of a martgagee had possession of certain title deeds to which the mortgagor was entitled. The attorney refused to deliver up these papers to the mortgagor until he would pay certain costs and expenses, for which he was not legally bound, and the attorney had no right to demand. He paid the money, got possession of his papers, and he brought suit to recover it back. Lord C. J. Denman said; "the evil of allowing extortion, by means of a wrongful detention of goods, would be great; and the wrongdoer has no right to complain when he is compelled to restore money which he was warned he had no right to exact. The case is wholly different from that class of cases where the parties have to a voluntary settlement of their concerns, and have chosen

to pay what is found due." (*Cartwright* v. *Rawley*, 2 Esp., 723.) The same principal is decided and maintained with great clearness and force by Chief Justice Tindal, in *Parker* v. *The Great Western Railroad Co.*, (7 Mann and Gr., 253) Also, by the superior court of New York city in the case of *Harmony* v. *Bingham*, (1 Dues, 229,) and by the Court of Appeals in 2 Kern, 99.

"In *Shaw* v. *Wood* (7 Barn. & Cress., 73) the property illegally withheld were certain policies of insurance, upon which the party holding them claimed a lien. The owner, to get his papers, paid the amount, and sued to recover it back. The court repudiated the idea of it being a settlement or compromise. It was simply an illegal extortion. *S. P. Astley* v. *Reynolds*, (2 Strange, 915) *Atlee* v. *Backhouse*, (3 M. & W., 643.) The same doctrine was held and distinctly announced in the case of *Oats* v. *Hudson*, (5 E. L. and E. Rep., 469.)

"In the case of *Astley* v. *Reynolds* (2 Str., 915,) the court says: "We think, also, this payment by compulsion; the plaintiff might have such an immediate want of his goods that an action of trover would not do his business. Where the rule *volenti non fit injuria* is applied, it must be where the party has his freedom of exercising his will. To the effect is *Chase* v. *Dwinel*, (7 Green, 134,) and numerous other cases.

"The arguments relied on here, that the claimants need not have acquiesced in the demands made by the commissioners—that they could have sustained suits in this court without having possession of their papers, is the old defence that has been urged in all the cases cited and overruled in each of them successfully. In all such cases the party can maintain trover and conversion for his goods, and determine for his title deeds or papers. but that fact does not vary the principle. The other party shall not be permitted to take advantage of, and reap a benefit from his own wrong. It is a great fallacy to suppose that to render a promise or agree-

ment, extorted by the detention of goods or papers, unavailable and void, the other party must have been without any other remedy. The doctrine I am contending for, and the cases cited in support of it, do not rest upon any such grounds, but upon the illegality of the means by which the promise was obtained, or the agreement exacted. To present to a man the alternative of paying an extortionate sum, or of relinquishing a legal right on the one hand, or be deprived of the rightful possession of his property, or obtain it through the delay, vexation and expense of a lawsuit on the other, the law holds to be unconscionable and unlawful, and renders every promise and agreement extorted in that way wholly null and void. In our cases it is not disputed that the claimants had a right to the possession of their papers; nor was it disputed that they were entitled to be paid the amounts which they afterwards received. And in view of these facts, we are called upon to decide upon the legelity and justice of withholding these papers, and the money due them, until they should agree to relinquish all claim to such part as the United States saw fit to dispute. This question has never been decided but one way by any respectable court in Christendom, holding common honesty and fair dealing require that a party shall be relieved from any bargain wrung by such means from his weakness or necessities.

"Leaving out of view entirely the withholding of the vouchers and papers, neither the legal nor moral aspect of the case is changed. It is not the law, nor is it in accordance with my views of sound morals, that where a party has a claim against another of, say, three hundred dollars, who admits that he is justly indebted in the sum of two hundred dollars, but refuses to pay it or any part of it unless the other will agree to relinquish his right to demand the balance. The debt is due; that part is undisputed. The creditor is entitled to it, without any reservation or condition. And where the other exacts and he, to obtain it,

gives a receipt in full for the entire claim, it is neither a release nor a compromise, but simply a promise, made not only without any consideration, but tainted with such illegal and inequitable conduct as renders it inoperative and void. Such, in my opinion, is the character of the receipts set up in those cases. It would be against all law, against all precedents, to sustain this as a compromise, and derogatory to the character of a great and just government, to allow such a state of facts to defeat the just claims of its citizens."

J. M. CARLISLE,
J. D. McPHERSON,
For Appellees.

Supreme Court of the United States.

DECEMBER TERM, 1868.—No. 197.

APPEAL FROM THE COURT OF CLAIMS.

BENJAMIN HIGDON

versus

THE UNITED STATES.

ARGUMENT FOR APPELLEE.

R. M. CORWINE,
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THE UNITED STATES, APPELLANT,

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ARGUMENT FOR APPELLEE.

CASE.

The defendant sold and delivered to the Government, to the acceptance of the quartermasters, prior to the 5th day of October, 1861, 1,423 horses, for which the appellants agreed to pay him at the rate of $130 per head. That for all the horses thus sold, delivered, inspected and accepted, the various quartermasters of the appellants issued and delivered him vouchers like unto the one set out in the record on page 5: "That said quartermasters received and accounted for the same, as for other property of the United States purchased by or turned over to them." (Record 5.)

The court on same page find that all of "said horses *thereupon* entered into the service of the defendant, (United States,) by being used in the military service."

On the next page the court find the value of said 1,423 horses to be $130 per head, amounting altogether to $184,990. They further find that the Government refused to pay the defendant, and referred the certificates and vouchers described above to a military commission appointed by the Secretary of War, and the commission deducted $15 per head "from the *agreed* or *contract* price."

Said commission, before delivering to defendant *his said vouchers, required* him to sign a certain instrument or agreement, purporting to *release* to the defendants the said amount so deducted, which release was attached to a schedule of claims of various persons, and was in the words following, viz: "The undersigned acknowledge to have received the vouchers referred to and described below, which, when paid, will be in full of all demands against the United States on account of their respective claims set opposite their respective names."

The appellee objected to signing this agreement and enters his protest.

Appellee subsequently received from the Government all but fifteen dollars per head so attempted as aforesaid to be withheld from him by way of *release.* Here is the receipt then given:

"Received at Washington, District of Columbia, the 1st day April, 1862, of Major Thomas J. Miller, quartermaster United States army, $12,305 dollars, in full of the above account."

The balance due appellee is $21,345, and has never been paid.

The court likewise find, that at the time of the sale and delivery of the horses mentioned and described, the public exgencies arising out of the war of the rebellion required the immediate delivery of the said horses by the appellee, and that the said articles was procured by *contract*, at the places and in the manner in which articles are usually bought and sold between individuals. (Record, 6.)

On page 7 is the judgment for $21,343, for $15 per head deducted by the commission.

ARGUMENT.

Then follow the conclusions of law; but the third, fourth, and fifth, are all that need claim our attention, since they constitute, and I suppose will form, the objective points of the learned law officer of the Government.

There are other findings of facts and conclusions of law, but they may be rejected as having no significance in the case as now presented. Most certainly, the question of General Frémont's power to make a contract, and clothe Col. Reeside with authority to inspect and purchase horses, does not enter into the case. This court will look into the record to ascertain the case, as found and decided by the court below, and will not go beyond it. All that is said there on that subject may be correct, and yet it does not affect the judgment or impair its validity.

The court finds that the defendant *delivered* to the quartermaster and he *received* the horses, and *agreed*, in writing, to pay for them $130 per head. They entered into the service of the Government, and were taken up on his property account; that is, he carried them into his account with the quartermaster's department, and reports them to his superior accounting officer, and the horses were charged to him. Thereafter they became and were the property of the Government, and were to be paid for according to his voucher then issued. It did not matter what means or agencies were used to put these horses into the service of the Government, so long as there was no fraud. That is not pretended. The quartermaster, the legal agent of the Government, whose authority cannot be questioned, says: "I certify that the above account is correct and just, and that the articles will be accounted for on my property return for the quarter ending on the 30th day of September, 1861." (Record, p. 5.)

What is that account? It is the statement of defendant of the number of horses which he sold, *with the price per head of each horse sold.* The moment the quartermaster signed that memorandum, at the bottom of the account, he agreed that the Government was bound to pay for those horses at the rate of $130 per head. It was the *contract*, in writing, binding both parties alike. Legally, no one could make that contract but the quartermaster, and he was fully empowered to make it. He is clothed by law with the authority to buy horses. Thus, then, it seems that the horses were sold and received at

a stipulated price per head, and defendant was entitled to judgment for the contract price.

No question can arise out of the fact that the horses were purchased without a previous advertisement, because the court below found that "the public exigencies arising out of the war of the rebellion required the immediate performance of the services of the said Reeside *and the immediate delivery of the said horses*," &c. (Record, p. 6.) This finding is conclusive on this point, and cannot be reviewed by this court, if it was of any significance in the case. But the court go further, find that the "said service and the said articles were procured by *contract*, at the places and *in* the manner in which services were *usually* engaged and such articles were *usually* bought and sold between individuals."

But suppose this view is not sustained, then the judgment of the court below must be affirmed, because they found the horses to be reasonably worth $130 per head on the proof submitted. The fourth finding declares: "The *value* of said five hundred and twenty-two horses, so sold and delivered as aforesaid, was $130 dollars per head, amounting in the whole to the sum of $67,806." (Record, p. 6.) This must be conclusive, as the court cannot review the facts which went to justify this conclusion of the court. Besides, if this court should do so, the record is wholly silent on this subject, omitting to set forth any of that evidence.

But the learned Attorney General may say that the receipts signed by the defendant estop him from setting up a claim for this balance, because they are conclusive in law, either as a receipt or accord and satisfaction.

To that I have to say:

1st. There was no consideration for such receipts.

2d. There was no dispute about the justness of the claim or the amount due. It was not the subject of controversy. The horses were delivered, and the prices stipulated for in writing signed by the duly-authorized agent of the Government. It does not even appear what reasons operated on the minds of the commissioners to cut down the price. They had the quartermaster's vouchers before them, plainly indicating

the price per head, and the delivery and acceptance of the horses.

It was not, therefore, a *compromise* of a disputed claim.

3d. It was not an accord and satisfaction, because it appears affirmatively that the whole sum due was not paid, and that that was paid was not taken in satisfaction of the sum due.

4th. It was not an arbitration, because the defendant had no agency in selecting the commissioners, and did not agree in any form, in advance of their action, to abide by their award. What he did agree to afterwards was under duress. His money was due in October, 1861, and what was paid to him was not paid till May, 1862.

The rules of law by which this transaction may be tested are very clearly stated in the following cases, to which I ask the attention of the court. I group them together, rather than to arrange them under the divisions into which the subject naturally and logically run, because the principles they establish, as well as the cases, are familiar to the court, and do not need elaboration. They are cited that the learned counsel on the other side may examine them if they deem it necessary.

This receipt is a parol agreement and must have a consideration to support it. Thus, it has been held in Pennsylvania that a parol release of a judgment is sufficient in equity, but a consideration is necessary to support it. It is not enough that it is in writing, if without a consideration. All contracts are either by specialty or parol; there is no third-class contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved *aliunde*, per Chief Justice Gibson,

Whitehall *vs.* Wilson, 3 Penn.

7 Barr, 100, *In re* Campbell's estate.

A receipt is but *prima facie* evidence of payment. It is always subject to explanation, and may, upon satisfactory proof, be restrained in its operations.

5 Gilman, Ill., 441.

24 Ill., 199.

4 Scammon, 40.

21 Pick., 101.

The release of a specialty debt by simple contract, and without consideration, is void.

5 Watts *vs.* Sergeant, 486, Miller *vs.* Hemler.

Unless a receipt is the result of a *compromise*, it is subject to be explained and the transaction opened up.

4 Wash. C. C. R., 562, Lawrence *vs.* the Schuylkill Navigation Co.

A release not under seal, in consideration of part payment in money of a debt past due, is no discharge of the balance, the release being without consideration.

9 Richardson's (S. C.) Rep., 135, Hope *vs.* Johnston.
Bailey *vs.* Day, 26 Maine, 88.
18 Verm., 337.
11 *Ib.*, 60.

Unless it is where the demand is unliquidated and uncertain, the acceptance of a smaller sum will not discharge the whole debt.

Miles *vs.* Star, 2 Bail., 360.
Pinnel's Case, 5 Co., 117.
Err *vs.* Mosely, 2 Strob., 203.
Bailware *vs.* Harrison, 4 Rich. Eq., 317.
Pabodie *vs.* King, 12 Johnson, 426.

Statements in writing of the situation of the accounts between parties, *when not containing contracts*, fall within the same principle.

Ryan *vs.* Rand, 6 Foster, (N. H.,) 12.

Payment of a less sum than is due on a judgment, though received in full thereof, cannot operate as a discharge or satisfaction of the judgment.

8 Maryland, 107.
5 Gill., 189.

To enable a party to set up the defence of payment, there must be the concurring intention of the party making and the party receiving the payment. The payment must be received as well as made in satisfaction of the debt.

Cushing *vs.* Wyman, 44 Maine, 121.

Although there may be instances where individual judges may have expressed dissatisfaction with the rule, I apprehend no case can be found which is in direct and avowed conflict with it. It is too well settled, by an unbroken current of decisions, running through more than three centuries, to be shaken by a mere doubt, however respectable the source. It is firmly fortified by the warning injunction, *stare decisis;* and *omnis innovatio plus novitate perturbat quam utilitate prodest*, is a maxim too full of wisdom to be ignored at this enlightened day by a profession which strives to *settle* the law within fixed and well-defined boundaries of principle, in the light of well-considered and long-understood precedents.

Broom's Legal Maxims, 148.

The Secretary of War had no power to abate any portion of this claim by such coercive measures as were adopted in this case by the commissioners; and if he had not, manifestly these gentlemen, appointed by him to "examine and report upon all UNSETTLED CLAIMS against the military department of the West," &c., could not exercise it: more especially with respect to claims which were *liquidated*, and the *amount* fixed *in writing* by the only authority that could bind the Government for such supplies, viz: the quartermaster. He made the contract, in which the *prices* were fixed, excepted the property, and put it into the use of the Government. There was, therefore, nothing to settle. All *that* was determined by the written contract, which bound both parties. The cars were made, inspected, delivered, and accepted. Nothing remained for the Government to do, but to pay for them the *contract* price. But the order of the Secretary of War did not authorize these commissioners to ignore contracts regularly made, nor yet to fix amounts, nor determine what should or should not be paid on vouchers or contracts, nor yet determine what was a valid or an invalid contract. They were authorized to "examine and report upon all unsettled CLAIMS" for the consideration of the Secretary of War. This was the first order. The second, dated 25th November, 1861, restricted their action to the consideration of "all *just and legal claims* for supplies," &c., which, when *affirmed* by

the commissioners, would be paid. All other than *just and legal* claims were to be postponed for the action of Congress. Thus, it will be seen that the Secretary, fully possessed of the case, failed to authorize them to reject any portion of "just and legal claims," but confined their power, in that particular, to such claims as were "tainted with fraud," the which would be postponed for the action of Congress.

This was not an unsettled *claim* due defendant. It was a *contract debt*, the amount of which was fixed the moment the cars were delivered. After finding that the defendant entered into a written contract with the quartermaster to furnish the Government fifty platform and fifty box-cars, strictly to the acceptance of Captain Castle, whose opinion was to be final between the parties, as to workmanship, &c., and that the defendant delivered and the Government accepted fifty platform and fifty box-cars, which were accepted, the Court of Claims finds that the defendant is entitled to receive from the United States the *contract price* for the cars thus delivered and accepted, amounting to $76,250. Thus we see that the amount was liquidated, fixed, definite, and certain, by the concurrent act of both parties, leaving nothing to the judgment and determination of others. It was not, therefore, an unsettled claim, and did not come within the purview of the Secretary's order or instruction.

But it appears that the very voucher which these commissioners demanded this coercive receipt for, on its face, showed that there was due to defendant, *on this contract*, $76,250. The sixth finding of the Court of Claims (Record 4) is: "That the petitioner presented his claim to a commission appointed by the Secretary of War, composed of Messrs. Davis, Holt, and Campbell, and they allowed him thereof the sum of $58,750, and gave him their voucher therefor." And the eighth finding, (Record, p. 5): "That, on the said voucher, received from said commissioners, there had been paid $58,750, leaving unpaid the sum of $17,500."

Thus the court had the evidence before them that the sum paid was not in full of the contract price; but then and there was the evidence that the sum paid was less than the sum

actually liquidated and due, and there is no reason in law and fact why that balance was not then paid.

EFFECT OF THE ORDER OF THE SECRETARY OF WAR, AND ITS LEGAL CONSEQUENCES CONSIDERED.

1. I am not aware of any law which authorizes the Secretary of War to make an order in the nature of a statute of limitations, barring legal claims. That power belongs to the legislature. He may, perhaps, prevent debts from being contracted and contracts from being made by his official orders; but he has no legal right to cut off valid claims, nor can he ignore them by any mere order, after they have become valid and subsisting claims against the Government. They can be discharged in but one of two ways, viz: by payment or lapse of time, as prescribed by law. The power of the Secretary is derived from the law and the President. He is peculiarly the mouth-piece of the President, and can do no act without the President's order. The act of Congress, approved August 7, 1789, creating this officer, says he "shall perform and execute such duties as shall, from time to time, be enjoined on or intrusted to him by the President of the United States." The very fact that the Secretary went to Congress for authority to pay these claims shows the folly of the proposition, that he or his commission could legally bar the claims in whole or in part. As to legal claims, he is but an auditing officer, and his commissioners were nothing more.

In furtherance, and in affirmance of this view, I have to remark, that perhaps the most significant circumstance connected with the action of Congress, in passing the resolution to pay these claims, is to be found in the fact, that the order to pay them is limited to the sums allowed by the *Secretary of War*, thus treating the commissioners as merely the organs of the Secretary. In this respect the resolution is pointed, and cannot fail to impress upon the court the important fact, that Congress intended to do no more than order paid the claims allowed to be due by the Secretary of War. The names of the commissioners are used in the resolution only to identify the class of claims being legislated for, not to rec-

ognize their acts, except in so far as they, as the organs of the Secretary, have noted the allowance on the vouchers. If, then, they were not a judicial body, acting independently of the Secretary of War, but were mere clerks, whence comes their power to ignore legal claims and strike them dead by their mere words? Where do they derive power to set aside contracts and taboo vested rights under such contracts? The Secretary himself could do none of these things. Being the commission of his creation, how can they do these things, which he cannot do?

2. The act of presenting the claim to the commission was no more than presenting it to the Secretary of War for payment. If they had refused to allow any of the claim, it will hardly be claimed that the defendant would have been barred from suing it. The commission had no judicial powers, any more than the Secretaay of War, and could not by any order or judgment cut off legal rights.

ACCORD AND SATISFACTION.

The position that the receipt endorsed on the voucher is good as accord and satisfaction is not tenable.

1. Because on its face it appears that the sum paid was not *in full* of the amount made out and claimed to be due to the defendant. The rule is, that the mere consent of a party to accept a satisfaction, *without an actual satisfaction*, is not sufficient to discharge the other: the accord and satisfaction must be perfect, complete, and executed; for, were it otherwise, it would only be substituting one cause of action for another, which might go on to any extent. (9 Rep., 76 b; 5 T. R., 141.)

Satisfaction must be made to the whole of the original demand, and a party will not be discharged upon performance of a satisfaction to part of such demand, the residue remaining unperformed. (1 Taunt., 526; 5 East, 230.)

DOUBTFUL CLAIMS—COMPROMISES.

But the learned solicitor of the Government assumes that this was a *doubtful* claim, and that the transactions were com-

promises of doubtful claims, and, therefore, the settlement will be upheld. The claim was *not* doubtful. Its validity was not questioned. Its justness not debated. The Government had received the property in the usual and ordinary way through its quartermasters. The defendant denied the right of the Government to abate a dollar of his claims, and refused to receive the money offered in full satisfaction. Now, a compromise is where both parties admit there is just ground for dispute, and their minds meet upon some mutual grounds of settlement, whereby both agree that the whole matter in dispute is settled. Here there were no such facts concurring; but, on the contrary, on the one hand, the agents of the Government say, take this or nothing, and sign the receipt; and on the other side the defendant says, I take the money, and sign the receipt under *protest*, denying the right of the Government to compel him to take less than the whole sum named in the vouchers, in full satisfaction. To make it a legal compromise, it wanted the most essential quality, viz, the concurrence of both parties.

The proceedings of this commission cannot even be called an arbitration, for the defendant was not consulted as to who the arbitrators should be; but, on the contrary, they were appointed by the Secretary of War, without reference to the wishes and intentions or desires of the defendant. It was essentially *ex parte*.

The books are full of cases to the point, that where payment is made under compulsion, in order to obtain the restoration of property or the payment of money unjustly and illegally withheld, the money thus paid may be recovered back. I cite some of them.

Shaw *vs.* Woodcock, 7 B. & Cr., 73.
——————— 9 D. & R., 889.
Hill *vs.* Street, and Morgan *vs.* Palmer, 2 B. and Cr., 729; 4 D. and R., 283.

And when the payment is made, or the money received under *duress or necessity*, so as to give the transaction the character of compulsion, *or one where undue advantage is taken*

of the parties' situation, or where the party has not freedom in the exercise of his will.

Moses *vs.* McFarland, 2 Burr, 1005.
Smith *vs.* Bombey, cited in Doug., 696.

Here the defendant had made large outlays, and there were large balances due him. He had already been delayed in the payment so long, that he found himself *compelled* to accept the hard terms imposed or be pecuniarily ruined. Thus the demand of the commission was the taking an undue advantage of the defendant's situation. He was not left free to exercise his will.

It is impossible for me to see upon what grounds the appellant expects to reverse this judgment. No brief has been furnished, and I have not been favored with the views of the Government counsel.

R. M. CORWINE,
Of Counsel.

Supreme Court of the United States.

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The balance due appellee is $21,345, and has never been paid.

The court likewise find, that at the time of the sale and delivery of the horses mentioned and described, the public exgencies arising out of the war of the rebellion required the immediate delivery of the said horses by the appellee, and that the said articles was procured by *contract*, at the places and in the manner in which articles are usually bought and sold between individuals. (Record, 6.)

On page 7 is the judgment for $21,343, for $15 per head deducted by the commission.

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a stipulated price per head, and defendant was entitled to judgment for the contract price.

No question can arise out of the fact that the horses were purchased without a previous advertisement, because the court below found that "the public exigencies arising out of the war of the rebellion required the immediate performance of the services of the said Reeside *and the immediate delivery of the said horses*," &c. (Record, p. 6.) This finding is conclusive on this point, and cannot be reviewed by this court, if it was of any significance in the case. But the court go further, find that the "said service and the said articles were procured by *contract*, at the places and *in* the manner in which services were *usually* engaged and such articles were *usually* bought and sold between individuals."

But suppose this view is not sustained, then the judgment of the court below must be affirmed, because they found the horses to be reasonably worth $130 per head on the proof submitted. The fourth finding declares: "The *value* of said five hundred and twenty-two horses, so sold and delivered as aforesaid, was $130 dollars per head, amounting in the whole to the sum of $67,806." (Record, p. 6.) This must be conclusive, as the court cannot review the facts which went to justify this conclusion of the court. Besides, if this court should do so, the record is wholly silent on this subject, omitting to set forth any of that evidence.

But the learned Attorney General may say that the receipts signed by the defendant estop him from setting up a claim for this balance, because they are conclusive in law, either as a receipt or accord and satisfaction.

To that I have to say:

1st. There was no consideration for such receipts.

2d. There was no dispute about the justness of the claim or the amount due. It was not the subject of controversy. The horses were delivered, and the prices stipulated for in writing signed by the duly-authorized agent of the Government. It does not even appear what reasons operated on the minds of the commissioners to cut down the price. They had the quartermaster's vouchers before them, plainly indicating

the price per head, and the delivery and acceptance of the horses.

It was not, therefore, a *compromise* of a disputed claim.

3d. It was not an accord and satisfaction, because it appears affirmatively that the whole sum due was not paid, and that that was paid was not taken in satisfaction of the sum due.

4th. It was not an arbitration, because the defendant had no agency in selecting the commissioners, and did not agree in any form, in advance of their action, to abide by their award. What he did agree to afterwards was under duress. His money was due in October, 1861, and what was paid to him was not paid till May, 1862.

The rules of law by which this transaction may be tested are very clearly stated in the following cases, to which I ask the attention of the court. I group them together, rather than to arrange them under the divisions into which the subject naturally and logically run, because the principles they establish, as well as the cases, are familiar to the court, and do not need elaboration. They are cited that the learned counsel on the other side may examine them if they deem it necessary.

This receipt is a parol agreement and must have a consideration to support it. Thus, it has been held in Pennsylvania that a parol release of a judgment is sufficient in equity, but a consideration is necessary to support it. It is not enough that it is in writing, if without a consideration. All contracts are either by specialty or parol; there is no third-class contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved *aliunde*, per Chief Justice Gibson,

Whitehall *vs.* Wilson, 3 Penn.

7 Barr, 100, *In re* Campbell's estate.

A receipt is but *prima facie* evidence of payment. It is always subject to explanation, and may, upon satisfactory proof, be restrained in its operations.

5 Gilman, Ill., 441.

24 Ill., 199.

4 Scammon, 40.

21 Pick., 101.

The release of a specialty debt by simple contract, and without consideration, is void.

5 Watts *vs.* Sergeant, 486, Miller *vs.* Hemler.

Unless a receipt is the result of a *compromise*, it is subject to be explained and the transaction opened up.

4 Wash. C. C. R., 562, Lawrence *vs.* the Schuylkill Navigation Co.

A release not under seal, in consideration of part payment in money of a debt past due, is no discharge of the balance, the release being without consideration.

9 Richardson's (S. C.) Rep., 135, Hope *vs.* Johnston.
Bailey *vs.* Day, 26 Maine, 88.
18 Verm., 337.
11 *Ib.*, 60.

Unless it is where the demand is unliquidated and uncertain, the acceptance of a smaller sum will not discharge the whole debt.

Miles *vs.* Star, 2 Bail., 360.
Pinnel's Case, 5 Co., 117.
Err *vs.* Mosely, 2 Strob., 203.
Bailware *vs.* Harrison, 4 Rich. Eq., 317.
Pabodie *vs.* King, 12 Johnson, 426.

Statements in writing of the situation of the accounts between parties, *when not containing contracts*, fall within the same principle.

Ryan *vs.* Rand, 6 Foster, (N. H.,) 12.

Payment of a less sum than is due on a judgment, though received in full thereof, cannot operate as a discharge or satisfaction of the judgment.

8 Maryland, 107.
5 Gill., 189.

To enable a party to set up the defence of payment, there must be the concurring intention of the party making and the party receiving the payment. The payment must be received as well as made in satisfaction of the debt.

Cushing *vs.* Wyman, 44 Maine, 121.

Although there may be instances where individual judges may have expressed dissatisfaction with the rule, I apprehend no case can be found which is in direct and avowed conflict with it. It is too well settled, by an unbroken current of decisions, running through more than three centuries, to be shaken by a mere doubt, however respectable the source. It is firmly fortified by the warning injunction, *stare decisis;* and *omnis innovatio plus novitate perturbat quam utilitate prodest*, is a maxim too full of wisdom to be ignored at this enlightened day by a profession which strives to *settle* the law within fixed and well-defined boundaries of principle, in the light of well-considered and long-understood precedents.

Broom's Legal Maxims, 148.

The Secretary of War had no power to abate any portion of this claim by such coercive measures as were adopted in this case by the commissioners; and if he had not, manifestly these gentlemen, appointed by him to "examine and report upon all UNSETTLED CLAIMS against the military department of the West," &c., could not exercise it: more especially with respect to claims which were *liquidated*, and the *amount* fixed *in writing* by the only authority that could bind the Government for such supplies, viz: the quartermaster. He made the contract, in which the *prices* were fixed, excepted the property, and put it into the use of the Government. There was, therefore, nothing to settle. All *that* was determined by the written contract, which bound both parties. The cars were made, inspected, delivered, and accepted. Nothing remained for the Government to do, but to pay for them the *contract* price. But the order of the Secretary of War did not authorize these commissioners to ignore contracts regularly made, nor yet to fix amounts, nor determine what should or should not be paid on vouchers or contracts, nor yet determine what was a valid or an invalid contract. They were authorized to "examine and report upon all unsettled CLAIMS" for the consideration of the Secretary of War. This was the first order. The second, dated 25th November, 1861, restricted their action to the consideration of "all *just and legal claims* for supplies," &c., which, when *affirmed* by

the commissioners, would be paid. All other than *just and legal* claims were to be postponed for the action of Congress. Thus, it will be seen that the Secretary, fully possessed of the case, failed to authorize them to reject any portion of "just and legal claims," but confined their power, in that particular, to such claims as were "tainted with fraud," the which would be postponed for the action of Congress.

This was not an unsettled *claim* due defendant. It was a *contract debt*, the amount of which was fixed the moment the cars were delivered. After finding that the defendant entered into a written contract with the quartermaster to furnish the Government fifty platform and fifty box-cars, strictly to the acceptance of Captain Castle, whose opinion was to be final between the parties, as to workmanship, &c., and that the defendant delivered and the Government accepted fifty platform and fifty box-cars, which were accepted, the Court of Claims finds that the defendant is entitled to receive from the United States the *contract price* for the cars thus delivered and accepted, amounting to $76,250. Thus we see that the amount was liquidated, fixed, definite, and certain, by the concurrent act of both parties, leaving nothing to the judgment and determination of others. It was not, therefore, an unsettled claim, and did not come within the purview of the Secretary's order or instruction.

But it appears that the very voucher which these commissioners demanded this coercive receipt for, on its face, showed that there was due to defendant, *on this contract*, $76,250. The sixth finding of the Court of Claims (Record 4) is: "That the petitioner presented his claim to a commission appointed by the Secretary of War, composed of Messrs. Davis, Holt, and Campbell, and they allowed him thereof the sum of $58,750, and gave him their voucher therefor." And the eighth finding, (Record, p. 5): "That, on the said voucher, received from said commissioners, there had been paid $58,750, leaving unpaid the sum of $17,500."

Thus the court had the evidence before them that the sum paid was not in full of the contract price; but then and there was the evidence that the sum paid was less than the sum

actually liquidated and due, and there is no reason in law and fact why that balance was not then paid.

EFFECT OF THE ORDER OF THE SECRETARY OF WAR, AND ITS LEGAL CONSEQUENCES CONSIDERED.

1. I am not aware of any law which authorizes the Secretary of War to make an order in the nature of a statute of limitations, barring legal claims. That power belongs to the legislature. He may, perhaps, prevent debts from being contracted and contracts from being made by his official orders; but he has no legal right to cut off valid claims, nor can he ignore them by any mere order, after they have become valid and subsisting claims against the Government. They can be discharged in but one of two ways, viz: by payment or lapse of time, as prescribed by law. The power of the Secretary is derived from the law and the President. He is peculiarly the mouth-piece of the President, and can do no act without the President's order. The act of Congress, approved August 7, 1789, creating this officer, says he "shall perform and execute such duties as shall, from time to time, be enjoined on or intrusted to him by the President of the United States." The very fact that the Secretary went to Congress for authority to pay these claims shows the folly of the proposition, that he or his commission could legally bar the claims in whole or in part. As to legal claims, he is but an auditing officer, and his commissioners were nothing more.

In furtherance, and in affirmance of this view, I have to remark, that perhaps the most significant circumstance connected with the action of Congress, in passing the resolution to pay these claims, is to be found in the fact, that the order to pay them is limited to the sums allowed by the *Secretary of War*, thus treating the commissioners as merely the organs of the Secretary. In this respect the resolution is pointed, and cannot fail to impress upon the court the important fact, that Congress intended to do no more than order paid the claims allowed to be due by the Secretary of War. The names of the commissioners are used in the resolution only to identify the class of claims being legislated for, not to rec-

ognize their acts, except in so far as they, as the organs of the Secretary, have noted the allowance on the vouchers. If, then, they were not a judicial body, acting independently of the Secretary of War, but were mere clerks, whence comes their power to ignore legal claims and strike them dead by their mere words? Where do they derive power to set aside contracts and taboo vested rights under such contracts? The Secretary himself could do none of these things. Being the commission of his creation, how can they do these things, which he cannot do?

2. The act of presenting the claim to the commission was no more than presenting it to the Secretary of War for payment. If they had refused to allow any of the claim, it will hardly be claimed that the defendant would have been barred from suing it. The commission had no judicial powers, any more than the Secretaay of War, and could not by any order or judgment cut off legal rights.

ACCORD AND SATISFACTION.

The position that the receipt endorsed on the voucher is good as accord and satisfaction is not tenable.

1. Because on its face it appears that the sum paid was not *in full* of the amount made out and claimed to be due to the defendant. The rule is, that the mere consent of a party to accept a satisfaction, *without an actual satisfaction*, is not sufficient to discharge the other: the accord and satisfaction must be perfect, complete, and executed; for, were it otherwise, it would only be substituting one cause of action for another, which might go on to any extent. (9 Rep., 76 b; 5 T. R., 141.)

Satisfaction must be made to the whole of the original demand, and a party will not be discharged upon performance of a satisfaction to part of such demand, the residue remaining unperformed. (1 Taunt., 526; 5 East, 230.)

DOUBTFUL CLAIMS—COMPROMISES.

But the learned solicitor of the Government assumes that this was a *doubtful* claim, and that the transactions were com-

promises of doubtful claims, and, therefore, the settlement will be upheld. The claim was *not* doubtful. Its validity was not questioned. Its justness not debated. The Government had received the property in the usual and ordinary way through its quartermasters. The defendant denied the right of the Government to abate a dollar of his claims, and refused to receive the money offered in full satisfaction. Now, a compromise is where both parties admit there is just ground for dispute, and their minds meet upon some mutual grounds of settlement, whereby both agree that the whole matter in dispute is settled. Here there were no such facts concurring; but, on the contrary, on the one hand, the agents of the Government say, take this or nothing, and sign the receipt; and on the other side the defendant says, I take the money, and sign the receipt under *protest*, denying the right of the Government to compel him to take less than the whole sum named in the vouchers, in full satisfaction. To make it a legal compromise, it wanted the most essential quality, viz, the concurrence of both parties.

The proceedings of this commission cannot even be called an arbitration, for the defendant was not consulted as to who the arbitrators should be; but, on the contrary, they were appointed by the Secretary of War, without reference to the wishes and intentions or desires of the defendant. It was essentially *ex parte*.

The books are full of cases to the point, that where payment is made under compulsion, in order to obtain the restoration of property or the payment of money unjustly and illegally withheld, the money thus paid may be recovered back. I cite some of them.

Shaw *vs.* Woodcock, 7 B. & Cr., 73.

——————————— 9 D. & R., 889.

Hill *vs.* Street, and Morgan *vs.* Palmer, 2 B. and Cr., 729; 4 D. and R., 283.

And when the payment is made, or the money received under *duress or necessity*, so as to give the transaction the character of compulsion, *or one where undue advantage is taken*

of the parties' situation, or where the party has not freedom in the exercise of his will.

Moses *vs.* McFarland, 2 Burr, 1005.
Smith *vs.* Bombey, cited in Doug., 696.

Here the defendant had made large outlays, and there were large balances due him. He had already been delayed in the payment so long, that he found himself *compelled* to accept the hard terms imposed or be pecuniarily ruined. Thus the demand of the commission was the taking an undue advantage of the defendant's situation. He was not left free to exercise his will.

It is impossible for me to see upon what grounds the appellant expects to reverse this judgment. No brief has been furnished, and I have not been favored with the views of the Government counsel.

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Of Counsel.